DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 06-0474
Sales and Use Tax
For Tax Years 2002-2004

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ISSUE

I. Sales and Use Tax—Transportation Exemption**.**

Authority: *Long v. Dilling Mechanical Contractors, Inc.*, 705 N.E.2d 1022 (Ind. Ct. App. 1999); *Meyer Waste Systems, Inc. v. Indiana Department of State Revenue*, 741 N.E.2d 1 (Ind. Tax Ct. 2000); IC § 6-8.1-5-1; IC § 6-2.5-5-27; 45 IAC 2.2-3-20; 45 IAC 2.2-8-12.

Taxpayer protests the assessment of sales tax.

II. Tax Administration—Negligence Penalty**.**

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is in the garbage hauling business for light industrial and residential customers in Indiana. As the result of a review, the Indiana Department of Revenue ("Department") issued proposed assessments for use tax for the tax years 2002 through 2004. Taxpayer protests these assessments and claims that it is eligible for the transportation exemption. Further facts will be supplied as required.

I. Sales and Use Tax—Transportation Exemption**.**

DISCUSSION

Taxpayer protests the imposition of use tax for the tax years 2002 through 2004. The Department conducted a sales tax review for those years. Taxpayer sought refunds of sales tax from two suppliers, which were also related companies. As explained in the review:

> [Taxpayer] presented exemption certificates, claiming public transportation, to [Supplier 1] and [Supplier 2] which in turn issued credit memos to [Taxpayer] for all sales tax paid to [Supplier 1] and [Supplier 2] for 2001-2004.

The Department determined that the exemption certificates were incomplete as required by 45 IAC 2.2-8-12(d), and assessed use tax on items Taxpayer purchased for its business. The review also determined that complete or incomplete status of the exemption certificates was moot, since Taxpayer was not eligible for the public transportation exemption. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the assessment is made, as provided by IC § 6-8.1-5-1(c).

In its audit report, the Department referred to 45 IAC 2.2-3-20, which states:

> All purchases of tangible personal property which are delivered to the purchaser for storage, use, or consumption in the state of Indiana are subject to the use tax. The use tax must be collected by the seller if he is a retail merchant described in Reg. 6-2.5-3-6(b)(010) [45 IAC 2.2-3-19] or if he has Departmental permission to collect the tax. If the seller is not required to collect the tax or fails to collect the tax when required to do so, the purchaser must remit the use tax directly to the Indiana Department of Revenue.

Taxpayer claims that it is entitled to the public transportation exemption. The exemption is found at IC § 6-2.5-5-27, which states:

> Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

Also of relevance is 45 IAC 2.2-5-61, which states in relevant part:

> (a) The state gross retail tax shall not apply to the sale and storage or use in this state of tangible personal property which is directly used in the rendering of public transportation of persons or property.
> (b) Definition: Public Transportation. Public transportation shall mean and include the movement, transportation, or carrying of persons and/or property for consideration by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities, and other specialized carriers performing public transportation service for compensation by highway, rail, air, or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the public service commission of Indiana, the Interstate Commerce Commission, the aeronautics commission of Indiana, the U.S. Civil Aeronautics Board, the U.S. Department of Transportation, or the Federal Maritime Commissioner; however, the fact that a company possesses a permit or authority issued by the P.S.C.I., I.C.C., etc., does not of itself mean that

> such a company is engaged in public transportation unless it is in fact engaged in the transportation of persons or property for consideration as defined above.
> (c) In order to qualify for exemption, the tangible personal property must be reasonably necessary to the rendering of public transportation. The tangible personal property must be indispensable and essential in directly transporting persons or property.
> ….

The Indiana Tax Court has addressed the question of how to apply the public transportation exemption to garbage haulers. In *Meyer Waste Systems, Inc. v. Indiana Department of State Revenue*, 741 N.E.2d 1 (Ind. Tax Ct. 2000), the court wrote:

> This Court has decided three previous cases that have analyzed the application of *IND. CODE Section 6-2.5-5-27* to garbage haulers. These cases are *Indiana Waste Systems of Indiana, Inc. v. Indiana Department of State Revenue, 633 N.E.2d 359 (Ind. Tax Ct. 1994)* (*Indiana Waste* I), *Indiana Waste Systems of Indiana, Inc. v. Indiana Department of State Revenue 644 N.E.2d 960 (Ind. Tax Ct. 1994)* (*Indiana Waste* II), and *National Serv-All, Inc. v. Indiana Department of State Revenue, 644 N.E.2d 954 (Ind. Tax Ct. 1994)*. In *Indiana Waste* I, this Court held that garbage constituted "property" within the meaning of *IND. CODE Section 6-2.5-5-27*. *Indiana Waste I, 633 N.E.2d 359 at 368*; *see also National Serv-All, 644 N.E.2d 954 at 956*. In all three cases, this Court also held that in order to qualify for the exemption the hauler must not be the owner of the garbage. [2] *Indiana Waste I, 633 N.E.2d 359 at 367*; *Indiana Waste II, 644 N.E.2d 960 at 961*; *National Serv-All, Inc., 644 N.E.2d 954 at 956*. Moreover, the carrier must be *predominantly* engaged in transporting property of another to be entitled to the exemption. *Indiana Waste II, 644 N.E.2d 960 at 961*.
> *Id.* at 4-5.

Taxpayer states that it has contracts which require Taxpayer to not only collect the garbage, but also to dispose of the garbage. Taxpayer believes that this proves that Taxpayer's customers never relinquish control of the garbage, and that Taxpayer is therefore hauling property which does not belong to it. Taxpayer states that, under *Long v. Dilling Mechanical Contractors, Inc.*, 705 N.E.2d 1022 (Ind. Ct. App. 1999), there can be no abandonment of the property if the owner does not relinquish all property rights. The court in *Meyer Waste Systems* stated:

> With respect to ownership, this Court has held that "at the point the garbage is abandoned, the generators of the garbage lose their ownership rights." *Indiana Waste I, 633 N.E.2d 359 at 367*; s*ee also National Serv-All, 644 N.E.2d 954 at 956-57*. **The Indiana Court of Appeals has held that a garbage generator abandons its garbage when it places garbage on the curb or curtilage to be picked up by the garbage hauler unless it takes affirmative steps to retain ownership or control.** ***Long v. Dilling Mech. Contractors, Inc., 705 N.E.2d 1022, 1026 (Ind. Ct. App. 1999), reh'g denied, trans. denied.*** "Absent an agreement between a garbage generator and a garbage hauler reserving ownership in the generator, the ownership of the garbage passes when the hauler removes the

> garbage from the generator." *Indiana Waste II, 644 N.E.2d 960 at 961*; *see also National Serv-All, 644 N.E.2d 954 at 956*.
> *Meyer Waste Systems*, 741 N.E.2d 1 at 5.
> **(Emphasis added.)**

Therefore, as explained by the Court of Appeals in *Dilling Mechanical Contractors*, and repeated by the Tax Court in *Meyer Waste Systems*, unless there is an affirmative step taken to retain ownership or control of the garbage, the generator abandons the garbage when it places the garbage on the curb.

Also, the court in *Meyer Waste Systems* explained:

> Meyer Waste also argues that its customers have a right to and "sometimes do" instruct Meyer Waste as to the location they desire for the disposal of their garbage. (Pet'r Post-trial Br. at 27.) The only evidence that Meyer Waste provides this Court with to support its argument is its own testimony. Meyer Waste does not provide this Court with any corroborative evidence such as provisions in its written contracts with its customers that the customers have a right to designate where they want their garbage to go. Meyer Waste also does not provide the testimony of any of its customers or others that retention of the right to designate where their garbage would go was part of any agreement between Meyer Waste and its customers. Meyer Waste's self-serving assertion without more is not probative evidence of control by the generators. Cf. *Dobbins v. State, 721 N.E.2d 867, 875 (Ind. 1999)* (stating that "it is within the province of the trier of fact to determine facts from evidence presented to it and then to judge the credibility of those facts"); *Milburn v. Milburn, 694 N.E.2d 738, 740 (Ind. Ct. App. 1998)* (holding that "in reaching its decision, the trial court must review self-serving and uncorroborated testimony by the claimant "'with caution and scrutiny.'"), trans. denied. Moreover, the evidence shows that Meyer Waste controls the majority of its customer's final disposal locations, as it contacts and makes the arrangements with landfills to dispose of the garbage that it hauls and handles the disposal fees. Meyer Waste testified that not many of its customers make specific requests indicating where they want their trash to go for its final disposition, but Meyer Waste will take it to a special location if a request is made and will charge the customer accordingly. Even assuming arguendo that these few customers retained the ownership, the majority of Meyer Waste's customers do not request a special location for disposal and thus those customers do not retain ownership. In order to qualify for the exemption the hauler must be predominately engaged in transporting the property of another. See Indiana Waste II, 644 N.E.2d 960 at 961. If only some of Meyer Waste's customers retained ownership, Meyer Waste would not be predominately transporting the property of another. *See Indiana Waste II, 644 N.E.2d 960 at 962* (holding that a garbage hauler was not entitled to the exemption because only 17.7 percent of its annual revenue came from hauling the garbage of another).
> *Id*., at 6-7.

The court in *Meyer Waste Systems* also explained:

> This Court reaffirms its holdings in *Indiana Waste* I, *Indiana Waste* II, and *National Serv-All* that in order to qualify for the transportation exemption to the use tax, one must haul the property of another. Consequently, Meyer Waste's argument that it qualified for the exemption despite the fact that it hauls garbage that it owns cannot prevail.
> *Id.*, at 11.

In the instant case, Taxpayer has not provided documentation which affirmatively establishes that its customers intended to retain ownership of the garbage. As explained in *Meyer Waste Systems*, merely agreeing to have another pick up the garbage and dispose of it is insufficient to establish that the generator of the garbage intends to own the garbage beyond the point where it is placed on the curb for collection.

Additionally, as the court explained in *Meyer Waste Systems*:

> Even assuming arguendo that these few customers retained the ownership, the majority of Meyer Waste's customers do not request a special location for disposal and thus those customers do not retain ownership. In order to qualify for the exemption the hauler must be predominately engaged in transporting the property of another. See Indiana Waste II, 644 N.E.2d 960 at 961" *Meyer Waste Systems.* 741 N.E.2d 1, at 7.

In the instant case, there is insufficient documentation to establish that the generators were the owners of the non-recyclable waste, or that Taxpayer was predominantly engaged in transporting the property of another.

Taxpayer argues that its contract with one municipality specifically states that Taxpayer becomes the owner of recyclable materials, and therefore the municipality must be the owner of the non-recyclable materials. As previously discussed, the Tax Court in *Meyer Waste Systems* explained that unless there is an affirmative step taken to retain ownership or control of the garbage, the generator abandons the garbage when it places the garbage on the curb. Implying ownership on behalf of the generator is insufficient.

Next, Taxpayer argues that the contracts state that Taxpayer shall not leave any waste material on private or public property, and that this provision stands for the proposition that its customers are directing Taxpayer's disposal of the waste. In Taxpayer's view, in the absence of such language, Taxpayer would be free to dispose of the waste in any manner it saw fit. Taxpayer would have freedom to risk criminal and civil penalties if it owned the waste and disposed of it improperly. Taxpayer argues that, since Taxpayer does not have the freedom to dispose of the waste as it sees fit, it does not own the waste and is therefore hauling its customers' property.

The Department is unconvinced by this argument. The inclusion of a prohibition on leaving waste on public or private property does not rise above the level of a customer contractually ensuring that a waste hauler does its job and hauls away the waste. There is no affirmative

statement that the customer intends to retain ownership of the waste, as required under *Dilling Mechanical Contractors*.

At hearing, Taxpayer offered the proposal that there may be a bailee-bailor relationship between Taxpayer and its customers. The court in *Meyer Waste Systems* explained:

> Meyer Waste next argues that it is entitled to the public transportation exemption because it is the bailee of the generators' garbage. A bailment is defined as an express or implied agreement between a bailor and bailee. *Norris Auto. Serv. v. Melton, 526 N.E.2d 1023, 1025 (Ind. Tax Ct. 1988).* A bailment is created where bailed property is delivered into the bailee's exclusive possession, and the bailee accepts the property. *Id.* Because this Court concluded above that Meyer Waste is the owner of the property, it cannot be the bailee. Therefore, this contention by Meyer Waste does not further its position.
>
> Meyer Waste has not shown that its customers agreed to retain ownership. Moreover, none of Meyer Waste's arguments demonstrate that anyone other than Meyer Waste owns the garbage that it picks up from its customers, the generators. Therefore, this Court holds that based upon established precedent, Meyer Waste owns the garbage that it hauls.
> *Id.* at 9.

In the instant case, Taxpayer has not shown that its customers agreed to retain ownership. Therefore, under *Meyer Waste Systems*, Taxpayer owns the garbage and Taxpayer is not a bailee.

In conclusion, Taxpayer's arguments all require the Department to accept Taxpayer's reading of the supplied contracts as implied customer retention of ownership of the waste. As previously explained, the burden of proving an assessment wrong rests with Taxpayer, under IC § 6-8.1-5-1(c). The courts in *Meyer Waste Systems* and *Dilling Mechanical Contractors* clearly require more than implication of ownership on the generator's part. Affirmative retention of ownership by the generator is required in order for a hauler to qualify for the public transportation exemption. Here, there is no affirmative retention of ownership by the generator. Therefore, Taxpayer takes ownership of the garbage upon collection, and so is not transporting the property of others. As explained in *Meyer Waste Systems*, the public transportation exemption applies only to those hauling the property of others. Taxpayer has not met its burden under IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

II. **Tax Administration**—Negligence Penalty**.**

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax year in question. Taxpayer protests the imposition of penalty. The Department refers to IC 6-8.1-10-2.1(a), which states in relevant part:

> If a person:
> …
> (3) incurs, upon examination by the department, a deficiency that is due to negligence;
> …
> the person is subject to a penalty.

The Department refers to 45 IAC 15-11-2(b), which states:

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) provides in pertinent part:

> The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, taxpayer incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). Taxpayer has not affirmatively established that its failure to pay the deficiency was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c).

FINDING

Taxpayer's protest is denied.

WL/BK/DK August 20, 2007